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DISTRICT COURT OF GUAM
TERRITORY OF GUAM

GABRIEL H.T. LAU,

Plaintiff,

vs.

DEPARTMENT OF EDUCATION
("FKA" GUAM PUBLIC SCHOOL
SYSTEM),

Defendant.

Civil Case No. 09-00015

OPINION AND ORDER

This matter comes before the court upon the motion to dismiss by the Defendant Department of Education, formerly known as Guam Public School System, filed on June 19, 2009. *See* Docket No. 9. After reviewing the parties' submissions, as well as relevant caselaw and authority, the court hereby **GRANTS** the motion and **DISMISSES** the case.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff Gabriel Lau ("the Plaintiff"), proceeding *pro se*, filed a Complaint asserting that he was wrongfully terminated by the Department of Education ("the Department") from his position as a teacher. *See* Docket No. 1. The Plaintiff has been a resident of Guam since 1987. *See id.* He worked at John F. Kennedy High School during the 2003-04 school year, and at Tamuning Elementary School during the 2004-05 school year. *See id.* After he completed his education and obtained teacher certification, he began working as a certificated teacher at D.L. Perez Elementary School on August 12, 2008. *See id.* As a certificated teacher, the Plaintiff was subject to a one-year probationary period pursuant to the personnel rules and regulations

1 governing the Department. *See id.*, Exh. 1.

2 On October 2, 2008, the Plaintiff received a “Memorandum of Reprimand” dated October
3 2, 2008, indicating that between 12:20 and 12:35 p.m. that day, the principal found the Plaintiff
4 sleeping on the job, leaving his students unsupervised. *See* Docket No. 6, Exh. 6. This
5 memorandum stated that the Plaintiff’s performance would be reviewed for 30 days, and if he
6 failed to change or improve, “there may be no alternative but to consider more stringent
7 disciplinary measures, including adverse action which may result in demotion, suspension, and
8 dismissal.” *Id.*

9 Apparently, on October 6, 2008, the Plaintiff informed his principal that he was sick and
10 unable to work, but she “demanded” that he come in to work and “did not show any kind of
11 consideration for [his] medical condition.” *See* Docket No. 1. (The Complaint does not indicate
12 the nature of the Plaintiff’s medical condition.)

13 On November 6, 2008, the Plaintiff received “Memorandum of Concern” from the
14 principal for his failure to attend faculty meetings, which is required according to the Guam
15 Education Policy Board Faculty Handbook. *See* Docket No. 1, Exh. 2. This memorandum again
16 warned the Plaintiff: “If you fail to change or improve, there may not be [an] alternative but to
17 consider more stringent disciplinary measures.” *Id.*

18 In a letter from Acting Superintendent of Education Arlene Unpingco dated November
19 25, 2008 (“the termination letter”), the Plaintiff was terminated from his position. *See id.*, Exh.
20 1. The termination letter refers to Section 904.602 of the Department’s rules and regulation,
21 which states “all certificated employees shall be required to serve a probation period of one (1)
22 year” Docket No. 1, Exh. 1. The termination letter also states: “Despite the fact that you
23 are being terminated as an employee of [the Department, this] does not prevent you from re-
24 applying for employment with the department.” *Id.*

25 Although unclear from the record, after his termination the Plaintiff apparently submitted
26 a complaint to the Guam Education Policy Board on March 2, 2009. *See* Docket No. 1, Exh. 3.
27 On April 15, 2009, the Plaintiff was again advised that he could apply for other open positions,
28 as his pending case “will not hamper [him] from submitting new applications for positions

1 currently announced at [the Department's] Personnel Services Division. . . . Your application
2 along with other applicants will be reviewed and processed in accordance with the
3 [Department's] Personnel Rules & Regulations.” Docket No. 1, Exh. 4.

4 The Plaintiff filed the Complaint in this case on May 29, 2009, alleging he was
5 wrongfully terminated on four grounds: 1) his termination was “without a justifiable cause”¹
6 because it was based on the school principal’s recommendation and observation; 2) he was
7 subject to retaliation arising from the “[r]efusal of the superintendent [of the Department] to give
8 [him] a teacher’s referral for re-employment”; 3) the principal violated the Family and Medical
9 Leave Act on October 6, 2008, when she “demanded” that he come in to work and “did not show
10 any kind of consideration for [his] medical condition”²; and 4) the principal “created a hostile
11 working environment” for a variety of reasons.³ See Docket No. 1. In his Complaint, the

13 ¹ Although Plaintiff concedes that he received the November 6, 2008 “Memorandum of
14 Concern” from the principal, he seemingly argues that there is no connection between this
15 memorandum and his termination letter. See, Docket No. 1, Exh. 2.

16 ² The Complaint does not indicate the reason that the Plaintiff called in “sick” on October
17 6, 2008, nor does it indicate the nature of the Plaintiff’s “medical condition.”

18 ³ The Plaintiff listed the following ways in which the principal created a hostile working
19 environment:

- 20 1. Most faculties attempted to block me from sources of help. I frequently felt
21 isolated.
- 22 2. My fourth grade chairman (Mr. Bais) for second quarter did not provide
23 information regarding giving perfect attendance award, and most improved
24 award. . . . This is an example of being misinformed.
- 25 3. I was required by the principal to supervise 22 students for three consecutive
26 days, from Mrs. Romas’s class without a lesson plan. . . .
- 27 4. After I returned from medical leave, my computer equipments were pushed
28 to the corner without any explanation from the principal. It is [an]
infringement of my classroom setting under the liberty of education.
5. Mrs. Hanzsek [the principal] conducted an informal observation of my class
and she never gave me a feedback so I can work on what I needed to
improve.

1 Plaintiff requests the following relief:

- 2 1) Reinstatement as a permanent teacher and be placed at any Elementary School
3 of my choice.
- 4 2) Back pay from November 24, 2008 to the time I get reinstated.
- 5 3) Letter of apology from the acting superintendent of education (Mrs. Arlene
6 Unpingco).

6 *Id.*

7 The Plaintiff filed a “Complaint Amendment” on June 2, 2009, adding two more reasons
8 to support of his wrongful termination claim. *See* Docket No. 6. Under claim 5, the Plaintiff
9 seems to argue that the principal did not comply with the Department’s “Probationary Teacher
10 Evaluation Program” which includes, *inter alia*, holding a pre-evaluation conference and at least
11 a formal observation with written feedback. *See* Docket No. 6, Exh. 6. Under claim 6, the
12 Plaintiff states that after receiving a “Memorandum of Reprimand” regarding his sleeping on the
13 job, he never received feedback from the principal about his performance. *See id.*, Exh. 6. He
14 contends that because the principal failed to review his performance after November 14, 2008,
15 “it is only right that I get at least a satisfactory evaluation.” *See id.*

16 Notably, neither the Plaintiff’s Complaint nor his “Complaint Amendment” refers to any
17 claim of discrimination based on his national origin, which the Plaintiff had alleged in a
18 complaint he had made to the Equal Employment Opportunity Commission.⁴

20 6. No administrator informed me that I had a Special Education student in my
21 D.I. Writing class. I found out from the parent during Parent Teacher
22 Conference.

22 g.[7.] The principal believe[s] that I am young and I could not get sick often. On
23 September 16, 2008, she told me that I could not take anymore sick leave of
24 absence. I had no alternative but to force myself to go to work and conduct
25 my teaching even though I was seriously ill.

25 Docket No. 1.

26 ⁴ On December 15, 2008, the Plaintiff filed a Charge of Discrimination against the
27 Department, alleging discrimination based on national origin. *See* Docket No. 15, Exh. 1. The
28 Plaintiff alleged that he was “not treated equally” by his school principal, because the school
principal, who is Chamorro, gave another teacher the option to change classrooms due to a

1 The Department, through the Office of the Attorney General, sought dismissal, arguing
2 that there was no basis in federal statute, the Federal Rules of Civil Procedure, or the court's
3 local rules of procedure, for the Plaintiff's Complaint. The Department argued dismissal should
4 be granted pursuant to: 1) Rules 12(b)(1) and 12(h)(3) because the court lacks subject matter
5 jurisdiction; 2) Rule 12(b)(2) because the court lacks person jurisdiction; 3) Rule 12(b)(4)
6 because there was insufficient service of process; and 4) Rule 12(b)(6) because the Plaintiff fails
7 to state a claim for which he is entitled to relief. *See* Docket No. 9. In addition, the Department
8 urges the court to dismiss pursuant to Rule 41(b), as the Plaintiff's pleadings failed to comply
9 with both federal civil procedure rules and local rules of practice. *See id.*

10 II. DISCUSSION

11 Because jurisdiction is the threshold determination in every case, the court addresses this
12 argument first. The limited jurisdiction of the federal courts is well established. The United
13 States Supreme Court has stated:

14 Federal courts are courts of limited jurisdiction. They possess only that power
15 authorized by Constitution and statute, which is not to be expanded by judicial
16 decree. It is to be presumed that a cause lies outside this limited jurisdiction, and
the burden of establishing the contrary rests upon the party asserting jurisdiction.

17 *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted). The Ninth
18 Circuit Court has expressed the presumption of limited federal jurisdiction as follows: "A party
19 invoking the federal court's jurisdiction has the burden of proving the actual existence of subject
20 matter jurisdiction." *Thompson v. McCombe*, 99 F.3d 352, 353 (9th Cir. 1996) (citing
21 *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1559 (9th Cir.1987)).

22 The Department contends that the Plaintiff's allegations of wrongful termination fail to
23 plead any basis for this court to exercise its jurisdiction, either based on diversity jurisdiction
24 under 28 U.S.C. § 1332, or on federal question jurisdiction under 28 U.S.C. § 1331. *See* Docket
25 No. 6. The Plaintiff cannot claim diversity jurisdiction, which requires that there be complete

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27 nonoperational air conditioning unit, but he was not given this option. *See* Docket No. 15, Exh. 1.
28 He further states: "I believe I have been discriminated against because of my national origin
(Chinese)." *Id.*

1 diversity of citizenship between the plaintiff and defendant. Thus, this case will survive only if
2 the Complaint raises a federal question under 28 U.S.C. § 1331: “The district courts shall have
3 original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the
4 United States.”

5 The Plaintiff raises six grounds for termination: 1) lack of “justifiable cause” as his
6 termination was based on the principal’s observation and recommendation; 2) retaliation; 3)
7 violation of the Family and Medical Leave Act; 4) a hostile working environment; 5) failure to
8 comply with Department’s “Probationary Teacher Evaluation Program”; and 6) failure to receive
9 feedback from the principal about his performance. *See* Docket Nos. 1 and 6. The claims which
10 rely on the Department’s practices and policies (i.e., claims 1, 5 and 6) would clearly not trigger
11 federal jurisdiction, as there is no federal statute involved. However, the Plaintiff seemingly
12 relies on two federal statutes as a basis for federal question jurisdiction: Title VII of the Civil
13 Rights Acts of 1964 and the Family and Medical Leave Act of 1993.

14 Although the Plaintiff’s pleadings are far from clear, they must be construed liberally.
15 “A document filed pro se is ‘to be liberally construed,’ and ‘a pro se complaint, however
16 inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by
17 lawyers.’” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97,
18 106 (1976)). Accordingly, the court will address the claims made in both the Complaint and
19 “Complaint Amendment” despite the Plaintiff’s noncompliance with local rules of practice. *See*
20 Local Civ. R. 10.1 and 15.1. Moreover, the court declines to dismiss pursuant to Rule 41(b) of
21 the Federal Rules of Civil Procedure, merely for the Plaintiff’s failure to comply with the local
22 rules. *See* Docket No. 9.

23 **A. Title VII claim**

24 Although the Plaintiff generally argues that he was wrongfully terminated, this court will
25 interpret his Complaint as alleging that he was subject to retaliation and a hostile working
26 environment – terms which ordinarily trigger claims of employment discrimination pursuant to
27 Title VII of the Civil Rights Acts of 1964. *See* 42 U.S.C. § 2003, *et. seq.*

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1 **1. Retaliation**

2 The Plaintiff first contends that there was “retaliation” based on the “[r]efusal of the
3 [Department] superintendent to give [him] a teacher’s referral for re-employment,” apparently
4 because the Plaintiff had filed a complaint with the Equal Employment Opportunity Commission
5 (“EEOC”) after he was terminated. Docket No. 1. It appears that the Plaintiff argues this refusal
6 is an adverse employment action that triggers Title VII protection. *See Ray v. Henderson*, 217
7 F.3d 1234, 1240 (9th Cir. 2000).

8 Retaliation claims under Title VII are based on section 2000e-3, which states in pertinent
9 part:

10 It shall be an unlawful employment practice for an employer to discriminate
11 against any of his employees . . . because he has opposed any practice made an
12 unlawful employment practice by this subchapter, or because he has made a
 charge, testified, assisted, or participated in any manner in an investigation,
 proceeding, or hearing under this subchapter.”

13 42 U.S.C. § 2000e-3(a).

14 The Plaintiff argues that it was retaliation for the Department to deny him a referral for
15 re-employment. For support, the Plaintiff includes two exhibits, a March 16, 2009 letter and an
16 April 15, 2009 letter, both from the Department superintendent. *See* Docket No. 1, Exhs. 3 and
17 4. The March 16, 2009 letter requests that the Plaintiff refrain from contacting the Department
18 or any of its personnel, as they were awaiting the findings and recommendations by the EEOC.
19 *See* Docket No. 1, Exh. 3. The April 15, 2009 letter again advises the Plaintiff not to contact the
20 Department and its personnel because his case was under review. *See* Docket No. 1, Exhs. 3 and
21 4. The April 15, 2009 letter once again invites the Plaintiff to submit a new application for other
22 positions. This letter further advised the Plaintiff that waiting for the EEOC’s review “will not
23 hamper you from submitting new applications for positions currently announced at [the
24 Department’s] Personnel Services Division. If you qualify for the position, based on the
25 minimum requirements, you are more than welcome to submit your application. [The
26 Department] will continue to accept and process your application, as we have done previously . .
27 . .” Docket No. 1, Exh. 4. Based on the two letters provided by the Plaintiff (*see* Docket 1,
28 Exhibits 3 and 4), it is clear that his claim of retaliation under Title VII is without merit.

1 **2. Hostile working environment**

2 Next, the Plaintiff claims the principal created a hostile working environment. Title VII
3 provides that “[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse
4 to hire or to discharge any individual, or otherwise to discriminate against any individual with
5 respect to his compensation, terms, conditions, or privileges of employment, because of such
6 individual’s race, color, religion, sex, or national origin[.]” 42 U.S.C. § 2000e-2(a)(1). The
7 Plaintiff sets out six examples of the hostile working environment. *See* footnote 3. None of
8 these reasons, however, demonstrate discrimination based on the Plaintiff’s “race, color, religion,
9 sex, or national origin.” 42 U.S.C. §§ 2000e-2(a)(1). Thus, any claim of discrimination due to a
10 hostile working environment under Title VII is without merit.

11 As noted, even construing the Plaintiff’s claims liberally, the court finds no basis in Title
12 VII that provides for federal question jurisdiction.

13 **B. Family and Medical Leave Act claim**

14 The Plaintiff also seems to make a claim under the Family and Medical Leave Act
15 (“FMLA”), 29 U.S.C. § 2601, *et seq.*, arguing that the principal violated this federal law when
16 she “demanded” that he come to work on October 6, 2008, despite his unnamed “medical
17 condition.” *See* Docket No.1. The FMLA provides, as relevant to this case, that “an eligible
18 employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . .
19 [b]ecause of a serious health condition that makes the employee unable to perform the functions
20 of the position of such employee.” 29 U.S.C. § 2612(a)(1)(D).

21 The Plaintiff does not demonstrate how the FMLA applies here to warrant the court
22 exercising federal jurisdiction in his case. He makes only a bald allegation that the principal
23 “violated” the FMLA, which he seems to believe should automatically grant him the relief he
24 seeks, namely, reinstatement as a permanent teacher at a school of his choosing, back pay from
25 November 24, 2008, and a letter of apology. *See* Docket No. 1. The citation to the FMLA is
26 insufficient to justify this court expanding its jurisdiction to hear the case. “[T]he mere reference
27 of a federal statute in a pleading will not convert a state law claim into a federal cause of action
28 if the federal statute is not a necessary element of the state law claim and no preemption exists.”

1 *Easton v. Crossland Mortg. Corp.*, 114 F.3d 979, 982 (9th Cir. 1997). His own pleadings and
2 exhibits show that the Plaintiff was a probationary employee, and was terminated based on his
3 principal's observation and recommendation. *See* Docket No. 1, Exh. 1. These same pleadings
4 and exhibits reveal that the principal had found him asleep on the job with his students
5 unsupervised, and that the Plaintiff failed to attend school faculty meetings as required by the
6 Guam Education Policy Board. *See* Docket No. 1, Exhs. 1 and 2. Despite the Plaintiff's citation
7 to the FMLA, this federal law is not a necessary element of his case. The court finds that the
8 Plaintiff has not met his "burden of proving the actual existence of subject matter jurisdiction."
9 *Thompson*, 99 F.3d at 353.

10 III. CONCLUSION

11 Despite liberal reading of his *pro se* pleadings, the court finds that the Plaintiff has failed
12 to satisfy the threshold showing of federal jurisdiction. "Federal question jurisdiction extends
13 only in those cases in which a well-pleaded complaint establishes 'either that federal law creates
14 the cause of action or that the plaintiff's right to relief necessarily depends on a resolution of a
15 substantial question of federal law.'" *Easton*, 114 F.3d at 982 (quoting *Franchise Tax Bd. v.*
16 *Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)). The Plaintiff primarily claims he
17 was wrongfully terminated by the Department, and that the Department did not follow its
18 programs and policies. Nothing in Plaintiff's Complaint remotely demonstrates that the ultimate
19 ruling of his case depends on resolution of any federal law, including Title VII and the FMLA.
20 This court is cognizant that "that federal jurisdiction demands not only a contested federal issue,
21 but a substantial one indicating a serious federal interest in claiming the advantages thought to be
22 inherent in a federal forum." *Grable & Sons Metal Prods. Inc. v. Darue Eng'g & Mfg.*, 545 U.S.
23 308, 313 (2005). Plaintiff fails to demonstrate that there is a substantial federal issue raised in
24 his claims, or that the right to relief he claims "necessarily depends on a resolution of a
25 substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 28.

26 The court finds that the Plaintiff has failed to meet his burden of actually proving this
27 court has federal question jurisdiction. *See United States v. Marks*, 530 F.3d 799, 810 (9th Cir.
28 2008). Rule 12(h)(3) of the Federal Rules of Civil Procedure states that "[i]f the court

1 determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the
2 action.”⁵ Accordingly, the Motion to Dismiss is hereby **GRANTED**.

3 **SO ORDERED.**



5 /s/ Frances M. Tydingco-Gatewood
6 Chief Judge

7 Dated: Dec 29, 2009
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26 ⁵ Because the dismissal is granted based on the lack of federal jurisdiction pursuant to Rule
27 12(b)(1) of the Federal Rules of Civil Procedure, the court finds it unnecessary to address the
28 alternative grounds for dismissal argued by the Department, and the Motion to Add Parties and
Claims filed by the Defendant. *See* Docket Nos. 9 and 32.